Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

~~79~~-1580

NO. ————

MALCOLM BRITTON WOOTEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

NO. ————

MALCOLM BRITTON WOOTEN,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Malcolm Britton Wooten, by his Attorneys, prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals entered in the above case on January 16, 1980 and on March 13, 1980.

OPINIONS BELOW

No written opinion regarding the issues in this case was filed or published by the United States District Court for the Eastern District of Kentucky. The Opinion of the Sixth Circuit Court of Appeals, which affirmed the

Judgment of the District Court, is at pages 4a-8a of this Appendix and has not been officially reported to date. The Judgment of the Sixth Circuit Court of Appeals denying a timely filed Petition for Rehearing and Request for Rehearing En Banc was denied by order entered March 13, 1980, which order may be found at page 9a of this Appendix.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals for the Sixth Circuit and the date of its entry is January 14, 1980 (App. 4a-8a).

An Order of the Court of Appeals denying a timely Petition for Rehearing was entered March 13, 1980 (App. 9a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS

Amendment Five.

No person shall . . . be deprived of life, liberty, property, without due process of law.

Amendment Six.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

QUESTION PRESENTED

May a federal prosecutor call witnesses to the stand when it is known in advance that those witnesses would validly invoke the Fifth Amendment privilege to all questions asked and the government's sole purpose in calling such witnesses is to impress upon the jury the fact of their claim of privilege and thereby add weight to their theory of Conspiracy.

STATEMENT OF THE CASE

On May 3, 1978, Malcolm Britton Wooten, the Petitioner, was indicted in the Eastern District of Kentucky on one count of violating *Title 18, Section 371, United States Code,* "Conspiracy to commit an offense against the United States". Twelve Co-Defendants were also charged with conspiracy. The Indictment also listed eighteen additional substantive counts alleging violations of *18 USC § 1952(a)(1),* "The Travel Act", on the part of various Co-Defendants. Malcolm Wooten was not named in any of these substantive counts.

The conspiracy count charged the various Defendants with a common agreement to maintain business enterprises involving prostitution in eight states, to transport women between those states for purposes of prostituion and to use facilities in interstate commerce for purposes of prostitution. Malcolm Wooten was mentioned in only one overt act; which overt act was subsequently ordered stricken from the Indictment at trial for reasons of variance. In a Bill of Particulars, the Government listed five additional overt acts of Wooten which they claimed could have been charged but were not. Due to the entry of pleas by most of the original Co-Defendants, only four De-

fendants were actually tried: Malcolm Wooten, Marshall Riddle, Ralph Bernius, and Jacqueline Riley. The case was tried to a Jury in Covington, Kentucky, from July 13, 1979 to August 1, 1979.

The Government's case for conspiracy primarily centered around activities of Co-Defendant, Marshall Riddle, as the head of a prostitution business involving numerous prostitutes under his control whom he placed in truck stops, motels, apartments, bars, and massage parlors in various states. Jacqueline Riley, Riddle's common law wife, was shown to have prostituted herself at his direction. Ralph Bernius was shown to have once operated a truck stop prostitution outlet in Bucyrus, Ohio, and to have once transported a prostitute from Ohio to a massage parlor in West Virginia.

The Government's proof of Malcolm Wooten's alleged participation in this conspiracy primarily consisted of the testimony of three go-go dancer/prostitutes who testified that they were each approached by Wooten and offered his help in finding new employment. Two of the women were already working for Co-Defendant Riddle at the time and recounted derogatory statements about Riddle which Wooten made in his pitch. All three refused his offer. There was also proof that Wooten was twice seen with a prostitute named "Billie Jo" at Patty Thompson's house of prostitution in Newport, Kentucky. Girls from that house were occasionally sent to a truck stop in Florence, Kentucky, which was also used as a prostitution outlet by Marshall Riddle. There was proof offered that Malcolm Wooten once ate breakfast with Riddle, Co-Defendant Bernius, and five or more other assorted characters at a big table in a Newport, Kentucky, restaurant and that during the meal with Defendants Riddle and Bernius discussed prostitution and plans to send three women to Florida.

Wooten later told a Cincinnati bar owner about the planned trip. Two of the women involved, Darlene Seng and Jill Hahn, testified as to their prostitution in Florida on Co-Defendant Riddle's behalf and identified a third woman named Judy Richards as having driven to Florida with them and then run away. One of the women claimed that sometime around the time of the trip, Judy Richards had told her she was working as a prostitute for Malcolm Wooten.

During the trial, the United States announced they were calling Wanda Spradlin as a witness. Outside of the Jury's presence, defense counsel indicated that Miss Spradlin's privately retained counsel had previously indicated she would assert her *Fifth Amendment* privilege to all questions and objected to her assertion of privilege before the Jury (App. 10a). The Prosecutor indicated his awareness that the witness would invoke the privilege to all questions and argued that under the decisions of the Sixth Circuit he was entitled to put the witness on anyway (App. 10a-12a). The Trial Court agreed and told the Prosecutor he could have fairly reasonable latitude as to the questions asked, but that he wouldn't let him "make the whole case" (App. 11a). The Court and the Prosecutor then took up and agreed upon the questions which the witness would invoke the privilege to (App. 11a-13a). The questions agreed upon were: (1) Whether she knows the Defendant Riley?; (2) Whether she knows the Defendant Bernius?; (3) Whether she knows the Defendant Wooten?; (4) Whether she knows the Defendant Riley?; (5) If in the past five years she had worked as a prostitute; and (6) Whether she intended to rely upon the Fifth Amendment privilege as to each and every question asked concerning the four Defendants? (App. 11a-15a).

Defense counsel objected to both the questions and procedure on the grounds that their sole purpose was to convey an impression to the Jury that this woman is a prostitute who has been associated with all four Defendants (App. 11a-12a). The United States Attorney then specifically stated that all his proposed questions were based in "good faith" upon information he had received before trial (App. 12a). Defense counsel moved for mistrial in the event that the Court's procedure was followed; which Motions were overruled (App. 12a-13a). The Court offered to instruct the Jury that the assertion of privilege was personal and not to be held against any of the Defendants, which offer was accepted by defense counsel as helpful but not curative of the error in the entire procedure (App. 12a-13a).

The witness Spradlin was called and invoked the privilege to all questions before the Jury (App. 13a-16a). Defense counsel then moved for voir dire of the F.B.I. Case Agent to determine whether there was, in fact, information which would serve as a basis for the questions which had been asked her (App. 16a-17a). The Prosecutor then admitted that he didn't, in fact, know which Defendants Ms. Spradlin was involved with (App. 16a-18a) and asked leave to talk to the Case Agent. He then returned to admit that their information had only tied Wanda Spradlin to the Defendants Riddle and Riley and that "we do not have any specific attachment of Bernius and Wooten to this, other than they are charged in a conspiracy" (App. 19a-20a). Defense counsel moved again for mistrial based upon the Prosecution's bad faith in asking questions for which they had no factual predicate (App. 20a). These Motions for mistrial were also overruled (App. 20a-21a).

The Prosecution then informed the Court that it would next call Judy Richards who would also be taking the *Fifth Amendment* before the Jury and asked to follow the same

procedure (App. 23a). When the Court asked their basis for calling the witness, they represented that later in the trial Darlene Seng and Jill Hahn would testify that Judy Richards accompanied them on a trip to Florida and that she worked as a prostitute for Malcolm Wooten upon arrival (App. 24a). The Court, over defense objection (App. 23a-24a, 25a-26a), permitted the Government to call Judy Richards and have her invoke her privilege to the following questions: (1) Do you know a person named Darlene Seng?; (2) Do you know a person named Jill Hahn?; (3) Have you ever in your life engaged in the business of prostitution?; (4) Is it your intention to claim the privilege of self-incrimination on any question I would tend to ask you regarding this case? (App. 25a, 26a-27a). Motions for mistrial were again made and overruled (App. 25a, 26a). The Jury was again admonished (App. 27a).

On August 1, 1978, the Jury found Malcolm Wooten guilty of conspiracy and the Court immediately sentenced him to five years in the penitentiary (App. 11a). Wooten appealed this Judgment to the Sixth Circuit Court of Appeals on the grounds, among others, that the evidence was insufficient to support his conviction and that it was improper for the Government to call witnesses for the sole purpose of having them invoke their privilege before the Jury. A panel of that Court held the evidence sufficient, with one member dissenting (App. 6a, 7a-8a). The Court of Appeals also ruled that the United States was justified in calling witnesses whom it knew would invoke the *Fifth Amendment* privilege before the Jury because the questions asked were "relevant to the trial" and the assertion of privilege did not prejudice Defendants "unduly" (App 7a).

Malcolm Wooten now seeks Certiorari to review these decisions of the Federal Courts.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE DECISION OF A FEDERAL QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN NAMET v. UNITED STATES, 373 US 179 (1963), AND DOUGLAS v. ALABAMA, 380 US 415 (1965), AND IS ALSO IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

ARGUMENT

In *Namet* v. *United States,* 373 US 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963), this Court articulated two principles on which a prosecution witness's invocation of the *Fifth Amendment* privilege before a Jury may constitute reversible error:

1. "Prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" and
2. When "in the circumstances of a given case, inferences from a witness's refusal to answer added crucial weight to the prosecution's case in a form not subject to cross examination . . ." 373 US at 186-87, 83 S.Ct. at 1155, 10 L.Ed.2d at 283-84.

In *Douglas* v. *Alabama,* 380 US 415, 85 S.Ct. 1074, 13 L.Ed2d 934 (1965), these principles were given constitutional significance under the Due Process Clause of the *Fifth Amendment* and the Confrontation Clause of the *Sixth Amendment* and were made applicable to the States

under the *Fourteenth Amendment*. See 380 U.S. at 419-20, 85 S.Ct. 1074 citing *Namet*.

Namet involved a gambling tax prosecution in which a Federal prosecutor subpoenaed and then produced as witnesses at trial two co-defendants of Namet who had plead guilty earlier that day. Namet's counsel, who also represented both co-defendants, approached the Bench before the witnesses were called to inform the Court that he believed both witnesses were entitled to assert their *Fifth Amendment* privilege, despite their pleas. The Court reserved on the question of waiver of the privilege until the witnesses actually asserted it. When the first witness did, in fact, assert her privilege, the Prosecutor challenged it and the Court ruled that her plea had waived any privilege with respect to testimony about her own gambling activities and ordered her to answer questions on that subject. The Court also ruled that the privilege was available with respect to the witness's dealings with third parties. Joint counsel apparently acceded to the Court's decision once a means was established by which he could direct the witness when to assert the privilege. Under this arrangement, both co-defendants testified extensively to non-privileged but material facts and, in the course of that testimony, successfully asserted their privilege before the Jury to a few of the questions asked. Defense counsel argued from portions of the witnesses' non-privileged testimony in his closing.

In light of this fact situation, this Court found no inference of prosecutorial misconduct since Namet's prosecutor apparently called both witnesses in the good faith belief that: (1) any assertion of privilege was challengeable under legal precedent which existed at that time; (2) both witnesses would testify to non-privileged facts which were a necessary part of his proof and did so testify

and (3) the Defendant's counsel failed to object on Namet's behalf but in many instances actually acquiesced in the procedure once the rights of the witnesses were secured. *Namet* (supra) 373 US at 188-189, 10 L.Ed2d at 284-285. This Court also failed to find that inferences from the witnesses' refusal to testify added critical weight to the prosecution's case against Namet in a form not subject to cross-examination since (1) all possible inferences also could permissibly be drawn from these witnesses' non-privileged testimony and had been well established by that testimony, and (2) the effect of those questions which provoked valid assertions of privilege was minimized by the witnesses' lengthy non-privileged testimony and apparently by the weight of other evidence of the Defendant's guilt. *Namet* (supra) 373 US at 189, 10 L.Ed2d at 285.

In *Douglas* v. *Alabama* (supra), 380 US 415, this Court reversed a State conviction in which a prosecutor, after it became clear that a co-defendant/witness would invoke his privilege to remain silent to all questions, read that witness's previous confession while pausing repeatedly to ask the witness whether he had made the statement. Since portions of that confession implicated the Defendant on trial, this Court held that the inferences from the witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross examination and thereby prejudiced Douglas under the second principle of *Namet*. *Douglas* v. *Alabama* (supra), 380 US at 420, 13 L. Ed.2d at 938.

With the exception of the Sixth Circuit, the federal courts of appeal have uniformly held it to be prosecutorial misconduct for a prosecutor to intentionally call a witness when it is known in advance that the witness will assert a valid *Fifth Amendment* privilege to refuse to testify and the sole purpose of calling that witness is to

impress upon the Jury the inferences arising from its assertion. *United States* v. *Maloney* (CA2, 1959) 262 F.2d 525, cited with approval in *Namet* (supra); *United States* v. *Tucker,* (CA3, 1959) 267 F.2d 212 at 214, cited with approval in *Namet* (supra); *Fletcher* v. *United States,* (CADC, 1964) 332 F.2d 724 at 726-727; *United States* v. v. *Ritz* (CA5, 1977) 548 F.2d 510; *United States* v. *King,* (CA8, 1972) 461 F.2d 53; *United States* v. *Roberts,* (CA9, 1974) 503 F.2d 591 at 600; *United States* v. *Coppola,* (CA 10, 1973) 497 F.2d 1153. The American Bar Association Project On Standards Of Criminal Justice: *Standards Relating To The Prosecution Function* § *5.7(c),* reflect these cases in clearly stating:

> "It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege."

The Sixth Circuit rule differs in holding that such trial tactics do not constitute misconduct if the prosecutor: (1) believes the witness possesses information which would otherwise be relevant and admissible evidence, and (2) asks relevant questions when forcing assertion of the privilege before the jury. *United States* v. *Compton,* 365 F.2d 1 (CA6, 1966) cert. denied, 385 US 956; *United States* v. *Kilpatrick,* (CA6, 1973) 477 F.2d 357 at 360.

Applying their rule to Malcolm Wooten's case, the Sixth Circuit found no evidence of misconduct (App. 6) even though the record revealed the following facts surrounding the prosecution's use of the witnesses, Wanda Spradlin and Judy Richards:

1) The Prosecutor knew in advance that both witnesses would assert their *Fifth Amendment* privileges in refusing to testify (App. 10a, 11a, 23a);

2) The Prosecutor never challenged the validity of the witnesses' assertion of privileges;

3) The Prosecutor was not seeking non-privileged testimony from either witness;

4) The Prosecutor had not obtained immunity for either witness;

5) The Prosecutor's only expressed purpose in calling these witnesses was to have them invoke the privilege before the Jury, admittedly as a trial tactic, which he claimed was his "right" under Sixth Circuit opinions (App. 10a-11a, 23a);

6) The Prosecutor had, apparently, interviewed neither witness, nor had the F.B.I., nor had any Federal Grand Jury (App. 16a-18a, 19a, 23a, 24a);

7) After Wanda Spradlin's "testimony", the Prosecutor had to leave the courtroom to find out from the case agent who she was and what her relevance to the case was (App. 18a, 19a);

8) The Prosecutor had carefully thought out and presented to the Court, in advance, all the questions he wanted these witnesses to invoke their privilege to (App. 11a, 12a-13a, 24a, 25a);

9) Those questions were intentionally drafted to create inferences supporting the Government's case in areas where it was weak (App. 14a-16a, 25a, 26a-27a);

10) The Prosecutor falsely represented to the Court that each question asked was predicated in "good faith" upon information he had received and only after being threatened with voir dire of the case agent, admitted that he had had no foundation for at least two of the questions he'd asked (App. 12a, 17a, 19a-20a);

11) The Prosecutor took special pains to have one witness speak up when invoking the privilege so that the entire Jury would be sure to hear (App. 14a);

12) The entire procedure was strenuously and continuously objected to by defense counsel at Bench conferences before each witness was called (App. 10a, 12a, 13a, 14a, 15a, 16a, 20a, 21a, 23a, 24a, 25a-26a).

Any other Circuit, given these circumstances, would have reversed the resulting conviction for prosecutorial misconduct pursuant to the decisions already cited.

Applying their rule, the Sixth Circuit also held that, because the questions asked were "relevant" and "not out of the ordinary," the Defendant Wooten was not prejudiced "unduly" (App. 7a). Under any rule other than that of the Sixth Circuit, reversible prejudice to Malcolm Wooten would have been found under the second principle of *Namet* v. *United States* (supra) 373 US at 186-187, since inferences from the witnesses' refusals to answer added crucial weight to the Prosecution's case in a form not subject to cross-examination. Consider the following:

1) The Defendant Wooten was charged only with having joined an ongoing conspiracy with "slight evidence" allowing conviction.

2) The Government's case against Wooten was so weak that the dissenting member on the panel of the Court of Appeals ruled it was legally insufficient (App. 8a).

3) Although the entire trial was lengthy, the portions dealing with the actions of Malcolm Wooten were extremely brief.

4) The calling of the witnesses, Spradlin and Rich-

ards, and their assertion of privilege was a moment of high drama in that trial.

5) The calling of both witnesses created the impermissible inference that the Government wouldn't have put them on the stand if they didn't think their testimony would help convict the Defendants. *United States* v. *Ritz* (supra) 548 F.2d at 518.

6) Since both witnesses were on the Government's list of unindicted co-conspirators, their refusal to testify created the impermissible inference that their fear of incrimination reflected an acknowledgment that they had participated in a conspiracy. *8 Wigmore Evidence 3d Ed.* #2272, P426.

7) The questions asked Wanda Spradlin created the impermissible inferences from her assertion of privilege that she was a prostitute who was connected to all four Defendants, including Wooten, through the prostitution activity being considered in that trial;

8) There was no other evidence presented which would have supported an inference tying either Malcolm Wooten or Ralph Bernius to Wanda Spradlin. There was little, if any, evidence presented inter-relating all four of these Defendants in any activity (App. 2a-8a).

9) The questions asked Judy Richards created the impermissible inference from her refusal to testify that she was a prostitute and had traveled to Florida with Darlene Seng and Jill Hahn for purposes of prostitution;

10) There was no other evidence presented at trial which would have supported an inference that Judy Richards prostituted herself in Florida. The only other evidence that Judy Richards was ever a prostitute was an alleged out of Court statement she once made to that effect. Proving

Judy Richards prostituted herself was crucial to the Government's case against Wooten;

11) The blanket assertion of privilege by both witnesses to all questions, prevented cross-examination of either Judy Richards or Wanda Spradlin;

12) Both the Trial Court (App. 21a) and the Appellate Court (App. 7a) recognized that the calling of these witnesses "prejudiced" the Defendants to some degree and the Trial Court stated its awareness that the Prosecution was using their refusal to testify to "make the case" (App. 11a).

If ever the record of a case reeked of injustice to a Defendant from the deliberate use of this trial tactic by a Federal Prosecutor, this case does.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF KENTUCKY
COVINGTON

No. 78-25

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MALCOLM BRITTON WOOTON,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL:

In the presence of the attorney for the government the defendant appeared in person on this date August 1, 1978.

☒ WITH COUNSEL WILLIAM OLDFIELD.

PLEA:

* * *

FINDING & JUDGMENT:

There being a verdict of ☒ GUILTY.

Defendant has been convicted as charged of the

offense (s) of conspiring to travel in interstate & use a facility in interstate commerce, with intent to distribute proceeds of an unlawful activity & with intent to promote, manage, establish, carry on & facilitate the promotion, management, establishment & carrying on of an unlawful activity in violation of T18, Sec. 371, United States Code.

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of COUNT 1 – FIVE (5) YEARS IMPRISONMENT.

SPECIAL CONDITIONS OF PROBATION:

* * *

ADDITIONAL CONDITIONS OF PROBATION:

A Presentence Report was submitted to the Court before imposition of sentence and copies furnished to counsel pursuant to Rule 32, F.R.Cr.P.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period

of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

* * *

SIGNED BY:

☒ U.S. District Judge /s/ EUGENE E. SILER, JR.

[DULY CERTIFIED]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

78-5361, 78-5379, 78-5387

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARSHALL CLAY RIDDLE,
JACQUELINE RILEY,
MALCOLM BRITTON WOOTON,
RALPH LOUIS BERNIUS a/k/a ROY BURNS,

Defendants-Appellants.

ORDER

(Filed January 16, 1980)

Before: CELEBREZZE, MERRITT, and MARTIN, Circuit Judges

Appellants were among thirteen defendants indicted for conspiracy under 18 U.S.C. § 371 to violate the Travel Act and the prostitution laws of various states (Count I). Substantive violations of the Travel Act were also charged under 18 U.S.C. § 1952 (Counts II-XIX). A jury found each appellant guilty of conspiracy. Defendants Bernius, Riddle, and Riley were also convicted of substantive violations of the Travel Act. Defendants have appealed their convictions on numerous grounds.

This case involves a prostitution ring stretching from Pennsylvania to Florida. The center of activity was in northern Kentucky, focusing principally on defendant Riddle. The conspiracy began in May, 1973, and continued until May, 1978. These defendants were charged with (a) maintaining prostitution enterprises in eight states; (b) transporting women between these states for prostitution purposes; (c) using facilities in interstate commerce for prostitution activities; and (d) keeping these acts secret.

Riddle was the apparent kingpin of the conspiracy. Prostitutes connected with Riddle were found at truck stops, motels, apartments, bars, and massage parlors. Defendant Riley, a known prostitute, was described as Riddle's common law wife. She worked under Riddle's control in Kentucky and Ohio. Wooten and Bernius admittedly arranged prostitution activities, yet they denied having any connection with Riddle's operation. In fact, they argue that their businesses were in direct conflict with Riddle's interests.

On appeal, four basic arguments are raised by the defendants: (1) Insufficient evidence was presented as to each of them to justify the jury's verdict; (2) Hearsay, out-of-court statements of co-conspirators were improperly admitted into evidence; (3) The trial court erred by allowing the government to call witnesses to the stand when the government knew that they would invoke their Fifth Amendment privilege; and (4) The guilty pleas of nine other defendants should have been kept from the jury.

The transcript of the trial proceedings entails 27 volumes and nearly 2,300 pages. Proving a conspiratorial link among the defendants was a heavy task. Overwhelming evidence connected Riddle to most of the prostitution activities of the defendants. Bernius and Wooten disavow

any business relationship with Riddle, ascribing to be partners in their own enterprise. However, the three of them were seen together on numerous occasions at the Gladiator Restaurant in Newport, Kentucky. Topics of conversation there included exchanging prostitutes with their "Florida connection," defendant Reese, and sending girls to Atlantic City, New Jersey. Wooten was also involved in the conspiracy through defendant Patty Thompson's house of prostitution in Newport. Thompson also sent girls to a site in Florence, Kentucky, which was used by Riddle as well. Bernius' connection with Riddle was more tenuous, but sufficient evidence was presented to add him to the conspiracy. One such link was Athena Schoenbaechler, who testified that she worked as a prostitute for both Riddle and Bernius during the time in question. The argument for mutual exclusivity by Wooten and Bernius fails in light of these facts. Their activities were concentric with Riddle at the core.

The evidence showed that defendant Riley was a known prostitute and that she worked under Riddle's control. She contends that one mere instance of interstate activity was inconsequential in the overall conspiracy. However, the proof clearly implicates her in the conspiracy, and the jury justifiably convicted her under the circumstances.

Appellants' hearsay argument focuses on the decision in *United States* v. *Enright,* 579 F.2d 980 (6th Cir. 1978). Defendants contend the trial judge failed to rule preliminarily on the existence of a conspiracy before co-conspirators' testimony was received. Without such ruling, they argue, it was improper to receive their testimony. Apparently the Enright decision was brought to the court's attention midway through the trial. At that point the court determined that the declarants and the defendants were members of a conspiracy.

The government is accused of calling certain witnesses with the knowledge that such witnesses would invoke their Fifth Amendment privilege. However, none of these witnesses were asked questions out of the ordinary, nor did their refusal to testify unduly prejudice any of the defendants. The government did not know of a third instance beforehand. Defense counsel advised the court of a fourth taking of the privilege. No showing of bad faith on the government's part was made, nor were the questions asked irrelevant to the issues at trial. The government was therefore justified in calling witnesses who invoked the Fifth Amendment privilege. *United States* v. *Compton,* 365 F.2d 1 (6th Cir.), *cert. denied,* 385 U.S. 956 (1966).

Appellants' fourth argument questions the propriety of admitting guilty pleas of co-defendants. However, defense counsel refused an admonition that the jury not infer guilt on the remaining defendants because some of the remaining codefendants had pled guilty.

Defendant Riddle has also challenged the sufficiency on search warrants which were executed to obtain evidence against him. He views the affidavits upon which the search warrants were issued as defective. He contends that the affidavits should not have been considered simultaneously for two different apartments to be searched. However, two contemporaneously filed affidavits may be taken into account by the magistrate in determining probable cause in relation to each. *United States* v. *Dudek,* 560 F.2d 1288 (6th Cir. 1977); *United States* v. *Nolan,* 413 F.2d 850 (6th Cir. 1969). In addition, the requirements for use of a confidential informant were satisfied under *Aguilar* v. *Texas,* 378 U.S. 108 (1964).

Accordingly, the judgments of conviction are affirmed.

Judge Merritt dissents from this order on the grounds

that the record does not disclose that the defendants, Bernius, Wooten, and Riddle, were working together in a common enterprise or entered into a single conspiratorial agreement. He believes that such an agreement cannot be inferred from the proof. Although the parties discussed prostitution, there is no indication in the record that they were in business together or cooperated for joint financial gain. Rather, the proof indicates that they were adversaries attempting to steal prostitutes from each other. It is true that Reese and Riddle were partners. It is also true that Bernius and Wooten were going to buy a club in Florida together. It is true that Riddle and Elmore had business dealings together on occasion. These relationships, however, were isolated, sporadic and not interrelated. Accordingly, Judge Merritt would reverse the conspiracy convictions.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-5379

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MALCOLM BRITTON WOOTON,
Defendant-Appellant.

ORDER

(Filed March 13, 1980)

Before: CELEBREZZE, MERRITT, and MARTIN, Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case, and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's order,

Now, therefore, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

By /s/ GRACE KELLER
Deputy Clerk

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

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[392] * * *

You may call another witness for the United States.

MR. GAMBILL: Wanda Spradlin.

MR. SLUKICH: Your Honor, may I approach the bench for a moment?

THE COURT: Yes.

(The following occurred at the bench in the presence of counsel and the Court:)

MR. SLUKICH: Your Honor, I have been advised by a gentleman by the name of Martin, first name I do not know, who is an attorney from [393] Cincinnati in the case, that he represents Miss Spradlin and that she is going to assert the Fifth Amendment. At this time I would respectfully request the Court that if she does indicate this, even now, the Court may make that determination, that save and except her name and address, no questions regarding her association, identification and knowledge of any of these defendants be made, because I feel it is prejudicial. She has a right to assert the Fifth. It is my position that any questions asked of the witness thereafter, which tend to create the atmosphere of any wrongdoing as to any of the defendants is improper.

THE COURT: All right, Mr. Arehart.

MR. AREHART: If your Honor please, I believe this problem was presented to this Court in the recent past. I know there are two Sixth Circuit cases on that. I don't have the citation right off the bat. One of them involves a case when you were U. S. Attorney and I was on your staff, involving the same thing, when I put a witness on

the stand for the United States and was advised by an agent that this man was under investigation concerning his activities. [394] We approached his Honor outside the hearing of the jury and advised him of his rights. He advised us that he would not testify, he would take the Fifth Amendment. Judge Swinford allowed us to put him on the stand and ask him just a few basic questions, whether he knew the defendant or didn't know the defendant. He took the Fifth Amendment and the Sixth Circuit ruled that that was not improper, that even though we knew he was going to take the Fifth Amendment, we take each witness at a risk, we have a right to put them on, even though we know that. We don't plan to go through a whole list of questions.

MR. SLUKICH: U.S. against Gradle.

MR. SLUKICH: It was raised, your Honor and they just took it on the search warrant. They never got into the substantive issues that were raised. They just took it on the one.

THE COURT: The cases under the Sixth Circuit state that you can ask them questions and I will give you fairly reasonable latitude, but you can't make the whole case. You can shorten the questions and we can take it up here [395] out of the presence of the jury.

MR. AREHART: I want to advise the Court what I plan to ask her, if she knows the Defendant Clay Riddle and ever worked as a prostitute for him. I have been advised that she's going to take the Fifth Amendment. And I would like to ask her then if she knows the remaining defendants. If she takes the Fifth, we're not going to go through a whole set of questions.

MR. OLDFIELD: The sole purpose in doing it is to leave the impression with the jury on this that she knows Clay Riddle, she knows the other defendants, and she did

work as a prostitute. That's the only purpose in asking the questions, and the United States Attorney, I believe, is by his own regulations, by the Department of Justice, prohibited from producing a witness before a Grand Jury when he has been advised in advance that he is going to take the Fifth Amendment. I believe I can find book and page in the directions from the Department of Justice where that practice is prohibited by manuals set forth in the Department of Justice and certainly it should be prohibited in the courtroom.

THE COURT: Well, I don't have [396] the manuals before me or the regulations.

MR. OLDFIELD: Well, I can get a copy.

MR. AREHART: They are irrelevant to the trial.

MR. OLDFIELD: That is not irrelevant to trial.

THE COURT: Well, there are sanctions to that. Unless it is something that shakes the conscious of the Court, the Court of Appeals says you can do it.

MR. OLDFIELD: The theory is that what alternative does the Grand Jury have but to indict somebody who stands up there and takes the Fifth Amendment. Now we have the same situation, where someone is brought deliberately before this jury, and who says that she is going to take the Fifth Amendment?

MR. AREHART: This is a good faith representation. We have been advised that she does know these defendants and does have some information. This is not just somebody off the street.

THE COURT: I will ask that you advise the witness that she has a right to [397] assert her privilege, and I will let you ask if she knows any other defendants and ever worked as a prostitute. If she takes the Fifth Amendment under those, you can ask the question if she is going to take the Fifth under all other questions. And I will advise

the jury that that is her privilege and a private privilege to her and her alone and should not in any way be held against the defendant. If you don't want it, I won't give it.

MR. SLUKICH: I think the Court should give it, but I don't think it is curative of the problem involved in the case.

THE COURT: Do you want it?

MR. SLUKICH: Yes, I will have to request it, but I think, representing Mr. Riddle, that if the United States assumes that posture and asks those questions, I would request the Court to declare a mistrial. And I wish it to be made known outside the presence of the jury, and I make it at this time.

THE COURT: If the U. S. does no more than ask what I have set out and outlined, a motion for mistrial is overruled.

MR. AREHART: I want to get it straight. If she knows the defendants, if she [398] ever worked as a prostitute —

THE COURT: No, just —

MR. AREHART: (Continuing — for the defendants.

THE COURT: No, just if she ever worked as a prostitute, not for the defendants.

MR. AREHART: If she ever worked as a prostitute.

THE COURT: And then if she asserts the Fifth Amendment, no other questions.

MR. AREHART: Just those four things?

THE COURT: Yes. You can ask her all four or each one individually.

MR. OLDFIELD: I would join in Mr. Slukich's motion for mistrial if they pursue this line of questioning.

THE COURT: All right, let that be overruled.

(Thereupon the colloquy at the bench ended.)

WANDA SPRADLIN,

being called as a witness by the government, first being duly sworn, testified as follows:

THE COURT: All right, you may [399] proceed, Mr. Arehart.

DIRECT EXAMINATION

BY MR. AREHART:

Q. State your name.

A. Wanda Spradlin.

THE COURT: Will you speak up a little and get closer to the grid in front of you, Miss Spradlin, so that you may be heard.

A. Wanda Spradlin.

Q Could you spell your last name?

A. S-p-r-a-d-l-i-n.

Q. Would you give us your address, where you live, and the city you live in?

A. I respectfully refuse to answer for the reason it might tend to incriminate me.

Q. Will you speak up just a little bit, ma'am, so the last lady in the jury can hear you.

A. Okay.

Q. Let me ask you if you know a man by the name of Marshall Clay Riddle?

MR. SLUKICH: Objection, your Honor.

THE COURT: Overruled.

A. I respectfully refuse to answer for the reason that it might tend to incriminate me.

[400] Q. Let me ask you, ma'am, if you know a man by the name of Ralph Louis Bernius?

A. I respectfully refuse to answer for the reason that it might tend to incriminate me.

Q. Do you know a man by the name of Malcolm Britton Wooton?

A. I respectfully refuse to answer for the reason that it might tend to incriminate me.

Q. I will ask you if you know a lady or a woman by the name of Jacqueline Riley?

A. I respectfully refuse to answer for the reason that it might tend to incriminate me.

Q. I will ask you, ma'am, if in the past five years you have worked as a prostitute?

MR. SLUKICH: Objection, your Honor.

THE COURT: Overruled.

A. I respectfully refuse to answer for the reason that it might tend to incriminate me.

Q. I will ask you one final question, ma'am. Is it your intention to rely on the Fifth Amendment privilege as to each and every question asked you concerning these four people?

A. I respectfully refuse to answer —

MR. SMITH: Judge, I'm going [401] to object to that question on the grounds —

THE COURT: Overruled.

MR. SLUKICH: May we approach the bench?

THE COURT: Overruled the objection to that. The witness is directed to answer that question. You will either have to answer yes or no. That could not possibly incriminate you, so you will have to answer that, ma'am.

THE WITNESS: What is the question?

Q. Do you intend to take the Fifth Amendment to each question we ask you?

A. Yes, sir.

MR. AREHART: I believe that's all.

THE COURT: All right, ladies and gentlemen of the jury, let me advise you that the raising of the privilege of

the Fifth Amendment to the Constitution is a right of any witness and that person may assert that privilege on the grounds that it might tend to incriminate that person; and since it is a personal matter, it is not in any way to be considered by the jury [402] as any evidence whatsoever against any of the defendants. It's strictly her personal right and no one else has control over that except her, and it's the same as if she testified to nothing.

All right, you may ask her any questions, Mr. Slukich, if you desire.

MR. SLUKICH: I do not desire to ask any questions, your Honor. Thank you.

THE COURT: Mr. Smith.

MR. SMITH: (Indicating in the negative.)

THE COURT: Mr. Westling?

MR. WESTLING: No questions, your Honor.

THE COURT: Mr. Oldfield?

MR. OLDFIELD: No questions.

THE COURT: You may step down, Miss Spradlin.

MR. AREHART: We ask that this witness be finally excused, your Honor.

THE COURT: All right. Any objection?

MR. OLDFIELD: None, your Honor.

I would like to approach the bench.

THE COURT: All right, come up.

[403] You may be finally excused.

(The following occurred at the bench in the presence of counsel and the Court:)

MR. OLDFIELD: The motion at this time would be for voir dire examination of Special Agent Conley. The United States Attorney has stated that they had information in their file that this witness did have information on the four defendants. He knew in advance what the an-

swers to the questions were going to be. If that would be true, then it should be evidenced by some sort of document in their file. If it is not in good faith as to all defendants, then I think the motion for a mistrial on behalf of the defendants on whom they do not have information would be proper at this point, because then it was done not in good faith.

THE COURT: Well, Mr. Arehart?

MR. AREHART: I don't know any case law on that.

THE COURT: Well, I think it's supposed to be made in good faith. Do you know —

MR. AREHART: The information I have is that the other girls that have testified [404] here said that these girls did work, you know, for the defendants. Now, whether it is all four of them, I don't know.

MR. OLDFIELD: Then there should be something in their file.

MR. AREHART: There doesn't have to be if the witnesses themselves told me.

MR. OLDFIELD: And we should have examination into that.

THE COURT: Well, if Mr. Arehart asserts that he had information that Miss Spradlin worked as a prostitute and was connected with the defendants, I think that is sufficient. It doesn't have to be from a statement Miss Spradlin gave. I gather Miss Spradlin didn't give any.

MR. OLDFIELD: I think we are entitled to know which witness it came from.

MR. SMITH: Because if she wasn't going to testify against my defendant, and we have information she wasn't —

THE COURT: Mr. Arehart, do you know who she is tied into?

MR. AREHART: I don't know whether it's all four defendants or not, no.

[405] THE COURT: Do you know which ones or one?

MR. AREHART: I would have to go out and talk to the agent and find out.

THE COURT: Okay.

MR. AREHART: Maybe Mr. Gambill knows.

THE COURT: Okay. Well, you can find out. We can go on with something else and you can make the record on that.

(Thereupon the colloquy at the bench ended.)

MR. GAMBILL: May we approach the bench, your Honor?

THE COURT: Yes.

(The following occurred at the bench in the presence of counsel and the Court:)

MR. GAMBILL: If your Honor please, the next witness that the government intends to call is a state trooper from Virginia named Sam Blevins, who in an undercover capacity was at a truck stop called Cloyd's Mountain Truck Stop, in Virginia, on May 17th, 1978. At this time he was solicited for the purpose of prostitution by [406] a young lady known as Jeanette Donaldson. This lady, your Honor, is the same lady, we believe, in this picture, in Government's Exhibit No. 1, described as being a prostitute, by Ralph Bernius. The testimony – he's not going to go into great detail about what he did or they did. Both reached an undressed state in this room. But I just wanted to put it on to prove that this girl was working at this truck stop, and I believe Athena also described this girl as

working in the State of Virginia. I believe she lives in West Virginia.

MR. SMITH: Judge, I think that would be very bad. That would be highly objectionable to put someone on who was arrested in Virginia, with the representation that he guessed she was working.

MR. GAMBILL: No, not that he guessed. Athena said that she was working for a Mr. Bernius.

MR. SMITH: Who said that?

MR. GAMBILL: Athena, the first witness that the government put on.

MR. SMITH: Well, Aethena didn't say that. It would be hearsay.

THE COURT: I will sustain the [407] objection at this time. I think you would have to put it in by this girl, whatever her name was — Jill?

MR. GAMBILL: Jeanette. Jan.

THE COURT: I think she would have to come in and state that. The trooper, I think, could be used to corroborate that, but I think she would have to connect herself to Bernius.

MR. GAMBILL: She said that this girl was a prostitute for Bernius.

MR. SMITH: We have no way of cross-examining her.

THE COURT: No, I don't think you can put that in.

MR. GAMBILL: I am glad I approached the bench first.

MR. AREHART: As to the last witness that testified, it's our information from the police that this witness had been surveilled by members of the Vice Squad and they had seen her go into known places of prostitution with "johns," dates. And a confidential informant informs that she is Riddle's number one girl. We have photographs of her together with Jackie Riley, and I believe Jill, in

some of these night spots. We [408] do not have any specific attachment of Bernius and Wooton to this, other than they are charged in a conspiracy.

MR. OLDFIELD: Renew my motion.

MR. SMITH: I ask that the U. S. Attorney withdraw any questions pertaining to —

MR. OLDFIELD: You can't withdraw questions at this point.

MR. SMITH: She took the Fifth Amendment as to all four defendants and that was my objection, making them say which one.

MR. AREHART: You objected and I rephrased the question.

MR. SMITH: But that leaves an inference that she knew my guy, which there is nothing to.

THE COURT: What do you want to do? Do you want to strike the questions? What is your motion?

MR. OLDFIELD: Mine is for a mistrial. I go back up to where I started in the beginning. I don't think you can erase something from a juror's mind, that taking the Fifth Amendment has with it an implication of some sort [409] of guilt, and taking it to a question, "Do you know the Defendant Ralph Bernius?" or Wooton or any of these defendants, or "Were you ever a prostitute?" and stand up in front of the jury and take the Fifth Amendment, when they have no foundation on this girl to connect her with Wooton, and I think this is a serious matter.

MR. AREHART: At this time the United States has established, I think, a prima facie case of conspiracy here between these four defendants, and if we have her tied into one of the defendants and the other one has testified that these other four defendants have conspired, there would be reason for me to think that she might know them.

THE COURT: I think from what I have heard at this point, there is sufficient evidence to at least make a prima facie case of conspiracy involving Mr. Riddle, Mr. Bernius and Mr. Wooton. I am not sure about Jacqueline Riley. But I also find that the U. S. has made a good faith effort to ask this witness questions pertaining to Mr. Riddle, and Miss Riley said she lived with him for a while. Now, I think if the U. S. asks a witness about Mr. Riddle and Miss Riley, [410] it would almost have to ask about Mr. Bernius and Mr. Wooton, because that would be more prejudicial against Riddle and Riley because it was just asked about those two and not the other two.

So if the old principle that to ask a witness a question and the witness takes the Fifth Amendment is of no effect, if we follow that, why there is no ground for mistrial. Let that motion be overruled.

MR. OLDFIELD: Your Honor, I would like the opportunity, because I have never looked at the law on this issue, I would like the opportunity to look at it and submit something to the Court on it.

THE COURT: You can do that at any time. We can always declare a mistrial if you have sufficient evidence.

MR. SMITH: Could we have a break?

THE COURT: Yes, If you need one.

MR. GAMBILL: I wanted to add something to the record, though, your Honor. Involving this state trooper, the United States does have an additional witness who is not here, [411] who will draw the connection between the Cloyd's Truck Stop and the truck stop in North Carolina where the girl, Athena, worked, and that the operators of each of these, both the massage parlor and the truck stop in North Carolina, the Mountain Truck Stop, were operated by the same people named DeAngelis.

THE COURT: Well, I think without a link from the

DeAngelises themselves, perhaps, or somebody who heard the DeAngelises say that they were involved in it with Mr. — who is it supposed to be?

MR. GAMBILL: Mr. Bernius.

THE COURT: I think I will sustain the objection. Now, the DeAngelises might come in and link up the two. If they do, you may put this trooper on.

MR. SMITH: Send him back to Virginia.

THE COURT: We will declare a recess if that is what you need.

(Thereupon the colloquy at the bench ended.)

THE COURT: All right, ladies and gentlemen of the jury, we're going to take a [412] short recess again. Keep in mind the admonitions I have given to you.

You may go upstairs and, Mr. Marshal, after the jury has gone upstairs you may declare a recess until 3:35.

(The court recessed until 3:35 P.M., at which time the following occurred:)

THE COURT: Let the record show all defendants and counsel are present in the courtroom.

Is there anything to take up before the jury comes down?

Let the jury come down, Mr. Marshal.

(The jury returned into the courtroom and resumed its place in the jury box.)

THE COURT: Let the record show all jurors are present.

You may call another witness for the United States.

MR. GAMBILL: May we approach the bench?

THE COURT: All right.

(The following occurred at the bench in the presence of counsel and the Court:)

[413] MR. GAMBILL: If the Court please, the next witness the United States intends to call is a witness who we think will take the Fifth Amendment. Her name is Judy Richards. I don't know whether the Court would object to these being taken back to back, but it would be our intention to follow the same procedure with this witness as we did with the previous one.

THE COURT: Let me ask you, since the issue was raised before, tell us on what basis you feel that she knows something about this, so the lawyers will all know about it.

MR. GAMBILL: This girl is Judy Richards. Judy Richards is the girl that is supposed, is alleged, we know, to have accompanied Darlene Seng and Judy Hahn to Florida, and the testimony will be that she was working for Malcolm Wooton during this trip to Florida. I believe that Tom Applegate also testified that he overheard conversations about her being sent to Florida.

MR. WESTLING: Your Honor, on behalf of the Defendant Riley, since the Court has already ruled that at this stage no prima facie case of conspiracy in all likelihood has been established against her, I will object to asking [414] the question, does she know the Defendant Riley. There is absolutely no connection in this case. In the other case, at least Mr. Arehart could show beforehand that there was a picture taken of Spradlin along with Riley. There has been no testimony that Miss Riley accompanied these people to Florida, and I believe there will be no testimony as such. I would therefore object at least to the inference that she did know these people.

THE COURT: All right. Anything else?

MR. OLDFIELD: Your Honor, I still object to the putting on of the witness. I object to the United States calling a witness regardless of what information they have

in advance that that witness is going to take the Fifth Amendment. It denies – it leaves an impression with the jury that there is some sort of guilt or some sort of association, and denies counsel for the defendants a right to cross-examine those witnesses, because it is obvious that they are not going to answer our questions.

Well, I think cases have been decided on each side. I think it is clear that it is such a personal right that until the witness actually [415] invokes it that you can't know that the witness is going to invoke it. We will restrict the U. S. to a sufficient number of questions based on what has been alleged, if she takes it. I think the only thing you can ask Miss Richards is if she knows Darlene Seng, Judy – what is her last name?

MR. GAMBILL: Hahn, your Honor.

THE COURT: If she knows Judy Hahn, or if she knows – or if she is supposed to have – when is she supposed to have gone to Florida?

MR. GAMBILL: In January of '77.

THE COURT: I will let you ask her if – she is supopsed to have come from Northern Kentucky to Florida in January of 1977?

MR. GAMBILL: She was supposed to have gone as a prostitute for the Defendant Wooton, your Honor. That has been the testimony of – it will be the testimony of Mr. Applegate, and I believe it may have been of one of the other persons who has testified. There was also some testimony that –

MR. SMITH: He never said he saw them go to Florida.

[416] MR. GAMBILL: No, but he said he overheard the Defendant Wooton and Mr. Ray Trimble, I believe it was, discussing Riley and this girl Judy Richards going along with several other girls to the State of Florida.

THE COURT: Well, what I will do, I will let you ask the questions, unless you don't want to ask these questions, but they are pertinent to what you have stated. You can ask her if she knows Darlene Seng and Judy Hahn, if she traveled to Florida in January of '77, if she has ever been a prostitute, and if she takes the Fifth Amendment on the others, this way, if there is an issue as to whether she knows the deefndant, we will raise it. If any of the defendants want to ask her if she knows your client, you may do that.

MR. WESTLING: Excuse me. But he will be restricted —

MR. SMITH: I wish he would be restricted to not asking if she knows Bernius, because he has no information that Bernius was connected.

THE COURT: Well, he is just going to ask if she knows Seng, Judy Hahn, and [417] if she traveled to Florida in January of '77, and if she has ever been a prostitute.

MR. GAMBILL: Your Honor, we have abundant information that she was a prostitute for Mr. Wooton. I think we ought to be permitted to ask her if she worked for Mr. Wooton.

THE COURT: Well, if we ask about one, I think we have to ask about all. That was my ruling on the other.

MR. GAMBILL: Can we do that?

THE COURT: I will restrict you — you can ask any other general question and if she takes the Fifth, I think you can assume she would take it if you ask whether she knew any of the defendants, so I will restrict it.

MR. SLUKICH: Just the previous motion I made at either the inception or the taking of the testimony of this Judy Richards, I would respectfully request the Court the same motion, and that would be our motion for a mistrial, and move to exclude that.

THE COURT: Yes, sir.

MR. OLDFIELD: You understand my motion was also for a mistrial on the basis of this witness.

[418] THE COURT: Yes. Let that be overruled, subject to her testifying the way we think she is going to.

(Thereupon the colloquy at the bench ended.)

THE COURT: You may call another witness for the United States.

MR. TREVEY: Judy Richards.

JUDY RICHARDS,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TREVEY:

Q. State your name please.

A. Judy Richards.

Q. Where do you live, Miss Richards?

A. 2303 Wyoming Avenue, Cincinnati, Ohio.

Q. Do you know a person by the name of Darlene Seng?

A. I respectfully decline to answer that question for the reason that it might incriminate me.

Q. Do you know a person by the name of Judy Hahn?

A. I respectfully decline to answer that question for the reason that it might incriminate me.

Q. Have you ever in your life engaged in the business of prostitution?

[419] A. I respectfully refuse to answer that question for the reason that it might incriminate me.

Q. Is it your intention, Miss Richards, to claim your

privilege against self-incrimination on any question I would tend to ask you regarding this case?

A. Yes.

MR. TREVEY: No further questions, your Honor.

THE COURT: Ladies and gentlemen, again the same admonition applies, that this is a person privilege of the witness and is not to be used by you in any way against any of the defendants by virtue of the fact that she has asserted that privilege.

Do you have any questions to ask her, Mr. Slukich?

MR. SLUKICH: I have none, your Honor.

THE COURT: Mr. Smith?

MR. SMITH: No questions, your Honor.

THE COURT: Mr. Westling?

MR. WESTLING: No, your Honor.

THE COURT: Mr. Oldfield?

MR. OLDFIELD: No, your Honor.

[420] THE COURT: All right. You may step down, Miss Richards.

You may call another.

* * *

Supreme Court, U. S.
FILED
MAY 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1580

In the Supreme Court of the United States

OCTOBER TERM, 1979

MALCOLM BRITTON WOOTEN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1980. A petition for rehearing was denied on March 13, 1980 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court committed reversible error in allowing the government to call two witnesses whom it had been advised would claim the privilege against self-incrimination and who in fact did claim the privilege.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner, Marshall Clay Riddle, Jacqueline Riley, and Ralph Bernius were convicted of conspiracy to transport women in interstate commerce for the purpose of prostitution and to facilitate and distribute the proceeds of business enterprises involving prostitution, in violation of 18 U.S.C. 371.[1] Petitioner was sentenced to a term of five years' imprisonment. The court of appeals affirmed (Pet. App. 4a-8a).

The evidence is summarized in the opinion of the court below. It showed a multi-state prostitution ring with co-defendant Riddle at the core of the conspiracy. The illegal activities were centered in Northern Kentucky, and prostitutes connected with Riddle were sent to various truck stops, motels, apartments, bars, and massage parlors. At trial ten women testified as government witnesses about their activities as prostitutes.

As the court of appeals noted (Pet. App. 5a), petitioner conceded that he arranged prostitution activities but denied any connection with Riddle. The evidence connecting petitioner to the conspiracy, however, included testimony that in late December 1976 or early January 1977, petitioner participated with Riddle in making plans for Julie Hahn, Darlene Seng and Judy Richards to travel from Ohio to Florida, where they would contact a "Florida connection," co-defendant Jerry Reese, and engage in acts of prostitution (Tr. 147-149, 198, 232-233, 1353-1354). Hahn and Seng were prostitutes who worked

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[1]Riddle and Bernius were also convicted of substantive violations under the Travel Act, 18 U.S.C. 1952. Nine other defendants pleaded guilty to either conspiracy or a substantive violation. Riley is the petitioner in No. 79-6093, pending in this Court on a petition for writ of certiorari.

for Riddle (Tr. 1320-1322); Richards said that she worked for petitioner (Tr. 1355). Thereafter, in January 1977, Hahn, Seng, and Richards went to Florida in Seng's car and met Reese (Tr. 1346, 1350, 1355-1358).[2] They initially stayed together (Tr. 271), although Richards did not stay for the entire trip. Hahn, testifying as a government witness, admitting performing acts of prostitution in Florida (Tr. 1356).

In late 1976, petitioner gave Riddle the name of a prostitution site in Atlantic City, because "there was good money there" (Exh. 13; Tr. 740-741, 1293-1295). Other evidence showed that petitioner had received the earnings of prostitutes (Tr. 684-688, 1736-1740, 1744-1745, 1758) and had attempted to recruit prostitutes to work for him (Tr. 1077-1078, 1344, 1365-1366).

2. Wanda Spradlin and Judy Richards refused to testify on grounds of self-incrimination when they were called as witnesses by the government. In each instance, before they were called to the stand, the district court was advised outside of the presence of the jury that they might so refuse to testify (Pet. App. 10a-13a, 22a-25a). Thereafter, with the court's permission, the government asked Spradlin in the jury's presence whether she knew Riddle, Bernius, petitioner, or Riley and whether she had worked as a prostitute (*id.* at 14a-15a). The court also permitted the government to ask Richards whether she knew Seng or Hahn and whether she had ever worked as a prostitute (*id.* at 26a-27a). When the two witnesses refused to answer these questions and said that they would refuse to answer any other questions, they were excused. Thereafter, in each instance, the court instructed the jury that a witness has a personal right under the

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[2]Reese in turn sent two women to the Cincinnati area to work as prostitutes for Riddle (Tr. 285-290, 348-349).

Constitution to refuse to testify and "since it is a personal matter, it is not in any way to be considered by the jury as any evidence whatsoever against any of the defendants. It's strictly her personal right and no one else has control over that except her, and it's the same as if she testified to nothing" (*id.* at 15a-16a; Tr. 419).[3]

ARGUMENT

Petitioner's sole contention, relying on *Namet* v. *United States*, 373 U.S. 179 (1963), and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), is that reversible error occurred when the prosecutor called Spradlin and Richards to the stand knowing that they would probably claim the privilege against self-incrimination. Petitioner asserts that asking these witnesses questions in the jury's presence constituted prosecutorial misconduct. In the circumstances of this case, the court below properly rejected this contention.

In *Namet* the government called two witnesses who had previously pleaded guilty to charges similar to those on which the defendant was subsequently convicted. These witnesses interposed the privilege against self-incrimination as to certain questions seeking to elicit information concerning their relationship with the defendant, and the privilege was upheld. The prosecutor had previously been advised by defense counsel that the witnesses, if called, would invoke the privilege against self-incrimination. In affirming the conviction, the Court stated that the prosecutor was not guilty of misconduct because the non-privileged testimony given by the witnesses had substantial value to the government's case. The Court then held that it could not find that "the few

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[3]When two other witnesses also refused to testify (Tr. 1275, 1723), the trial court also admonished the jury (Tr. 1278, 1732-1733). No issue is raised here concerning these refusals.

invocations of privilege by the [two witnesses] were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct," in view of the other evidence before the jury. 373 U.S. at 189.

In *Douglas* v. *Alabama*, *supra*, however, this Court found reversible error in a prosecution for assault with intent to murder where a prosecutor called as a witness a co-defendant who had previously been found guilty. The prosecutor had been advised that the witness would rely on the privilege against self-incrimination and would not answer any questions. The prosecutor produced a document, said to be a confession signed by the witness that named the defendant as the person who fired the shotgun blast that wounded the victim. The prosecutor then began to read the prior statement, pausing after every few sentences to ask the witness if he made the statement. Each time the witness refused to answer the question, but the prosecutor continued his questioning until the entire document was read. This Court concluded that this procedure denied the defendant the right to cross-examination secured by the Confrontation Clause of the Sixth Amendment. It said (380 U.S. at 420): "The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecutor's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' "

As in *Namet* and unlike in *Douglas*, the inferences from the refusal of the two witnesses to answer in the present case did not unfairly prejudice petitioner or add critical weight to the government's case. The prosecutor asked both women whether they were prostitutes and asked Spradlin whether she knew any of the four defendants.

Their refusals to answer these questions could not have had much effect in a case in which six of the ten prostitutes who testified knew petitioner, including three who said that he had recruited them to work for him in the prostitution business. Richards also declined to answer whether she knew Hahn and Seng but not petitioner. This was not prejudicial. Hahn was questioned extensively on both direct and cross-examination (Tr. 1232-1233, 1279-1281). A hotel registration card showed that Richards registered at the same time with Hahn and Seng in a Florida hotel on January 17, 1977 (Tr. 271; Exhs. 18 and 20). Petitioner was not even mentioned in the interrogation of Richards.

Nor was the prosecutor chargeable with misconduct, as petitioner asserts (Pet. 11-13). He did not question the witnesses before the jury until the court had been told that the witnesses might claim the privilege against self-incrimination and had authorized him to proceed. He asked only the questions that the court had in advance said he could ask. While it may have been preferable to have questioned the women outside the presence of the jury, petitioner did not suggest such a procedure (see Pet. App. 10a-27a). Significantly, the trial court gave admonitions that the refusal to testify was equivalent to the witness testifying to nothing, and such admonitions have been said to cure any error in calling a witness who asserts the privilege (Pet. App. 15a-16a). See *United States* v. *Maloney*, 262 F. 2d 535, 538 (2d Cir. 1959).[4]

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[4]Petitioner contends (Pet. 12) that the prosecutor had no basis for believing that Spradlin knew petitioner. The prosecutor, however, had a basis for believing Spradlin knew other members of the conspiracy (Pet. App. 19a-20a), and the Court ruled that a prima facie case of conspiracy between them and petitioner existed (*id.* at 21a). This is a sufficient factual predicate for asking the question.

Petitioner erroneously contends (Pet. 10-11) that the Sixth Circuit holds that a prosecutor may call a witness who he knows will claim a valid privilege for the purpose of impressing upon the jury the fact of the claim of privilege, so long as the prosecutor believes the witness possesses relevant and admissible information and the questions that provoke the claim of privilege are relevant. The Sixth Circuit has, however, never approved any such deliberate tactics. *United States* v. *Compton*, 365 F. 2d 1, 4-6 (6th Cir.), cert. denied, 385 U.S. 956 (1966), in fact reversed a conviction for persistent interrogation of a witness, after it was clear that the witness would invoke the privilege, by means of reading (as in *Douglas*) the witness's alleged confession implicating the defendant to the jury in the form of leading questions. To be sure, the Sixth Circuit allows the prosecutor to call a witness with pertinent information and to ask the witness any relevant and proper question concerning that information. See *United States* v. *Kilpatrick*, 477 F. 2d 357, 360 (1973). This much, however, is plainly permitted by *Namet*, where this Court made clear that a prosecutor is not prohibited from calling a witness merely because "it [is] known" that the witness plans to invoke the privilege. 373 U.S. at 185-186. What is proscribed is "a conscious and flagrant attempt to build [the prosecution's] case out of inferences arising from use of the testimonial privilege." *Id.* at 186.

Each case turns on its own circumstances concerning the extent of such an attempt and the extent of any prejudice. *Ibid.* In the present case, the prosecutor merely tested the witness's willingness to answer, limiting his questions to those permitted by the court. The episode was brief and followed immediate by customary instructions. The prosecutor did not use an improper form of question. He did not seek during the questioning

or thereafter in argument to wring inferences from the refusals to testify. Finally, the prosecutor did not seek to use the device as a means to use improper inferences. Nor could petitioner have been prejudiced by the questions and answers. The holding of the court of appeals, therefore, is fully consistent with this Court's decisions, and any error in the district court's action was harmless and would not warrant reversal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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